No. 16,183

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE OLSHAUSEN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S REPLY BRIEF.

GEORGE OLSHAUSEN,
1238 Pacific Avenue,
San Francisco 9, California,
Petitioner.

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Respondent has filed a brief which misstates some issues and ignores others. In answering it, we combine respondent's statement of the respective issues with their discussion.

I. APPLICABILITY OF DEFICIENCY NOTICE PROCEDURE—JURISDICTION OF TAX COURT.

A. On pages 5-6 and again at 8-9, respondent claims the issue to be whether the Tax Court had jurisdiction, asserting that petitioner denies this here and before the Tax Court. *This is not and never has been the contention.* We believe rereading of Petitioner's Opening Brief, pp. 6-14 will make this clear. Respondent here reverses the usual technique of brief-

writing. Normally a brief writer tries to find an authority which fits the facts of the case at bar. Respondent, on the contrary, tries to bend the facts of the case at bar to fit an authority (e.g., *E. C. Newsom,* 22 T.C. 22). *Apparently respondent is disinclined to discuss petitioner's real argument,* but prefers to knock down a straw man.

B. The argument which *was and is made* (and not mentioned by respondent) is that since Sec. 294(d) provides neither (a) that the "additions" shall be collected as part of the tax, nor (b) that they shall be collected in the manner of deficiencies, they fall into the *third* category of claims which must be enforced by an action in the District Court. Not only is this form of remedy specifically mentioned in the 1939 Code (Secs. 3740-45) but it is a well known and well established method. It was used in *Felton v. U.S.,* 96 U.S. 699, *U.S. v. Regan,* 232 U.S. 37, and *Hepner v. U.S.,* 213 U.S. 103, all cited on our opening brief.

Granquist v. Hackleman, No. 16035, decided Feb. 13, 1959, says, among other things:

> "§ 294(d) does not, however, contain the language quoted, which was contained in § 291 of the 1939 Code but which was omitted from § 6651 of the 1954 Code.
>
> * * * * * * *
>
> "There is a question, however, whether the assessments in the instant case may properly be called deficiencies."

(In *Granquist v. Hackleman* the *taxpayer* argued that he should be granted the deficiency notice pro-

cedure. There was no issue before the Court as to whether he might be entitled to a *better* procedure.)

C. Our constitutional arguments on this point, were made first of all in aid of construction of Sec. 294(d). (Pet. Op. Br. pp. 15-22.)

Respondent tries to meet these arguments separately at Resp. Br. pp. 10-14.

1. At best, respondent's arguments are confused. They sound as if counsel had not bothered to reread the VIIth Amendment. At Resp. Br. p. 6 they state this issue correctly in asserting that

> "The Tax Court proceedings involving the additions under Section 294(d) do not violate the *Seventh* Amendment . . ." (Italics added.)

But on p. 10 they say our argument to be

> "that the additions under Section 294(d) are imposed on the basis of alleged fault and accordingly *are either criminal or quasi criminal in nature.* . . . The short answer to this is that these additions are only *civil* ad valorem *sanctions.*
>
> ". . . The discretion extends to the imposition of *civil sanctions,* as under Section 294(d) and to permit such civil sanctions to be imposed on the basis of facts determined by an administrative agency. . . .
>
> ". . . The taxpayer's attempt to distinguish *Wickwire v. Reinecke* . . . upon the ground that that case dealt with proceedings to determine the amount of a tax and not with an adjudication of fault, is *misplaced* here since the additions here involved are *civil sanctions* . . ."

> (p. 13) "Here again the taxpayer's contention is based upon the *mistaken premise* that the additions under Section 294(d) are *not merely civil sanctions.*" (Italics added.)

But the Seventh Amendment deals exclusively with civil actions. (The Sixth Amendment deals with criminal prosecutions.) *In citing the Seventh Amendment we assumed that the sanctions of Sec. 294(d) are civil sanctions.*

At p. 11, respondent also argues, as quoted above, that supposedly "civil sanctions [may be] imposed on the basis of facts, determined by an administrative agency."

This is the only argument that makes a point, and we shall discuss it in detail in a moment. On its face it involves the *"fallacy of the excluded middle"*. Respondent argues that simply because the sanctions are not criminal, they may be enforced administratively—wholly overlooking or ignoring the Seventh Amendment which sets up a middle ground and guarantees a jury in *civil actions.*

2. Respondent's argument (p. 11, *supra*) that civil sanctions may be imposed administratively, cites *Helvering v. Mitchell,* 303 U.S. 391, and *Walker v. U.S.,* 240 F. 2d 601. But, this *still leaves the serious question of constitutionality,* which the statute must be construed to avoid.

Of the two cases cited, *Walker v. U.S.* merely refers to *Helvering v. Mitchell.* It is followed in *Beacham v. C.I.R.,* 255 F. 2d 103, cited Resp. Br. p. 10, n. 2.

Helvering v. Mitchell, 303 U.S. 391, 402, has a dictum that civil sanctions may be imposed administratively. (The only thing which the case *decided* was that acquittal on a *criminal* charge did not bar the imposition of civil penalties.)

But this dictum does not remove the serious constitutional problem which the statute must be construed to avoid.

In the *first* place, the *dictum* in *Helvering v. Mitchell* does no more than contradict the *dicta* in *U.S. v. Regan,* 232 U.S. 37 and *Hepner v. U.S.,* 213 U.S. 213, to the effect that a jury trial is required in an action by the government to enforce a civil sanction. *U.S. v. Regan* emphasizes the civil nature of the proceeding by holding that the government need prove its case only by a preponderance of evidence, not beyond a reasonable doubt.

Obviously, conflicting *dicta* from the United States Supreme Court leave a serious constitutional question.

In the *second* place, the cases cited in support of the *dictum* in *Helvering v. Mitchell* are far from conclusive.

The United States Supreme Court cases which are cited are all immigration cases except *Passavant v. U.S.,* 148 U.S. 214, which was a customs case. The immigration cases are explicitly based on the sovereign's plenary power to determine who may cross its borders. (*Oceanic Steam Nav. Co. v. Stranahan,* 214 U.S. 320; *Lloyd Sabaudo S.A. v. Elting,* 287 U.S. 333, 334.) *This, of course does not apply to persons*

and things already in the country. The customs cases may be put on the same ground. Besides, *Passavant v. U.S.,* 148 U.S. 214, 221 points out that there was involved only "a matter of mere computation". In the present case the statute requires determination of "reasonable cause" *versus* "willful neglect".

Of the income tax cases cited in *Helvering v. Mitchell,* none is by the U.S. Supreme Court, and none even mentions the Seventh Amendment.

It is well settled that a case is not authority upon a point involved in the facts but not discussed in the opinion.

(*U.S. v. L. A. Tucker Truck Lines,* 344 U.S. 33, 38; *Holiday v. Johnston,* 313 U.S. 342, 352; *U.S. v. Mitchell,* 271 U.S. 9, 14; *New v. Oklahoma,* 195 U.S. 252, 256.)

Third, more recent cases (arising under the rent control statutes) have held the Seventh Amendment applicable to actions by the government to impose a civil sanction. See: *U.S. v. Jepson,* 90 F.S. 983 (D.C. N.J.):

> (p. 984) "Long prior to our independence, there had grown up under original writs certain well-defined actions at common law, among them, the action of debt, covering, among other causes, suits for statutory penalties and qui tam actions."
>
> (p. 985) " ' . . . thus, in this case, though it be an action on the statute, it is an action of debt which is a common law action, and will be tried in a common law manner, . . .' "

> (p. 986) "It is my thought that when a federal statute embraces a common law form of action, that action does not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in an action for debt still prevails whatever modern name may be applied to the action. To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments. It is by such methods that courts lose their power to enforce the Bill of Rights."

Followed in *Leimer v. Woods,* 196 F. 2d 828 (C.A. 8).

To the same effect, *U.S. v. Strymish,* 86 F.S. 999, 1000—and see generally, *Hunt v. Bradshaw,* 251 F. 2d 103, 108 (C.A. 4).

3. On page 11, of its brief, respondent talks about "the long history of Tax Court procedure wherein Congress intended that fact finding should be done by the court and not by the jury."

That begs the question and is bad history. As shown in our Opening Brief (pp. 9-10), the 1939 Act is different from the acts of 1918 and 1921. If the earlier acts intended to deny a jury, the literal meaning of the 1939 Act shows an intention to restore it.

Apart from this, "long history" cannot change the meaning of a statute *(Holiday v. Johnston,* 313 U.S. 342, 351) nor, for the same reasons, of the Constitution. *Fairbank v. U.S.,* 181 U.S. 283, 310-11.

4. The issue of the inverted burden of proof is on no different footing. *Boynton v. Pedrick,* 228 F. 2d

745, Resp. Br. p. 13, does not refer to the constitutional question, nor cite *Western & A. R.R. v. Henderson,* 279 U.S. 639. *Helvering v. Taylor,* 293 U.S. 507, 515 deals with determination of a tax, not with imposition of a sanction.

On page 14 of Resp. Br. respondent gets further confused about the inverted burden of proof.

It *first* argues that the proceedings of the Tax Court are judicial. Without admitting the point, it would bring the matter clearly within the rule of *W. & A. R.R. v. Henderson,* 279 U.S. 639, in which the proceedings were also judicial.

Second, respondent says, "on appeal the relevant question is not whether the presumptive correctness of the Commissioner's determination violated due process (which we deny) but whether the Tax Court's proceedings were so unfair as to deny the taxpayer due process".

But the presumption of the correctness of the Commissioner's determination is an integral part of the Tax Court proceedings.

Where, as here, the Commissioner has found "wilful neglect", the presumption is *that there was wilful neglect.* This is quite similar to the presumption of negligence, which was held unconstitutional in *W. & A. R.R. Co. v. Henderson, supra.*

5. The foregoing authorities show that very substantial constitutional questions would arise from permitting the *civil sanctions* of sec. 294(b) to be enforced administratively. They do not in terms fall

within any provision for administrative enforcement which the statute contains. Under these circumstances, both the terms of the statute and the rule against raising unnecessary constitutional issues would put them within secs. 3740-45, providing for actions in the U. S. District Court.

II. GOVERNMENT BARRED BY LACHES. (Resp. Br. pp. 14-17.)

A. Respondent's discussion of this point begins at page 14 of its brief, but gets over to page 16 before mentioning the chief point—the fact that the government itself destroyed relevant evidence.

The relevance of the old forms is shown at App. Op. Br. p. 38.

Compare also the argument at Resp. Br. p. 22 that "The pamphlet also advised the taxpayer (p. 1) that if he needed more information he should inquire at the nearest office of the Collector of Internal Revenue." What the collector's office would have answered in any particular year depends upon the ruling which was being enforced in that year. The records of each year are therefore relevant to the present case.

So at Resp. Br. p. 21 respondent assumes that the 1943-44 change did not actually occur, as the basis for arguing that "the taxpayer's claimed lack of knowledge is further suspect". This argument is contrary to the findings of the Tax Court, as we show below. But since respondent has made the point, we now consider it at face value.

The contention that in fact no change of ruling or practice occurred in 1943-4 *makes these years relevant to the case* and likewise makes the *whole intervening period relevant.* Consequently the records for this period are relevant. Respondent having itself destroyed the records as "obsolete" cannot now prevail.

B. Respondent asserts (Resp. Br. p. 16):

> ". . . the Commissioner advised the taxpayer that the Archives and Library of Congress keep samples of outdated forms and instructions, and that one of the local libraries may also have them."

No record references are given for this statement, and it is untrue. (Cf. Pet. Ex. 10, R. 49-51.)

C. We submit that Ex. 10 answers the suggestion (Resp. Br. p. 16) that "he made little effort to do so" [obtain the old forms].

D. Respondent's complaint at the top of page 17 answers itself. Respondent says,

> "Finally, it would appear that the taxpayer is attempting to impose an impossible administrative burden by requiring the Commissioner to maintain an indefinite number of blank copies in stack of obsolete forms and pamphlets for an indefinite number of years, which previously had been made available to the public."

1. The government need not keep its old records, but is cannot press claims which they touch, after it has destroyed the records as *"obsolete".*

2. The problem is essentially the same as that posed by confidential documents. The government may

withhold a document as confidential, but it cannot then press a prosecution to which it is pertinent. (*Jencks v. U.S.,* 353 U.S. 657, 672; *U.S. v. Andolschek,* 142 F. 2d 503, 506.)

So with documents which are thought to have become "obsolete". The government, in pursuance of other policy, may make them unavailable by destroying them, but it cannot then press a claim to which they are relevant.

E. Nor is it an answer that the documents were once available to the public. If they are so old that the government has not kept them, there is no reason to hold that someone else must have kept them.

III. EVIDENCE DOES NOT SUPPORT FINDING OF WILFUL NEGLECT. (Resp. Br. pp. 17-23.)

A. There are two of our arguments which respondent does not answer.

First the object of Sec. 294(d) is to penalize wilful neglect. "Reasonable cause" is anything which negatives wilful neglect. (Cf. Pet. Op. Br. pp. 24-25.)

Second, respondent does not base "wilful neglect" upon the oversight of the instruction as to estimated returns appearing for the first time in the pamphlet for 1950.

B. Instead, respondent makes two other contentions.

1. At pages 21-22 respondent refers to the questions on Form 1040 about payments of estimated tax.

These questions are quoted in full in Appendix "A" to Petitioner's Opening Brief. They were always "how much have you paid on . . . Declaration of Estimated Tax".

On its face, this form of question permitted the answer "None". That is the answer which was actually given, and the Commissioner raised no objection for nine years. In short, the Forms 1040 were at best ambiguous, and the Commissioner's acceptance of them as rendered, year after year, was the resolution of an ambiguity.

2. The rest of respondent's argument is that the *statutes* were supposedly unambiguous, and the taxpayer, as a lawyer, had the facilities to check the instructions pamphlets against the statute. But these contentions will not support a finding of "wilful neglect".

a. The supposed unambiguousness of the statute would be important only if petitioner were bound to consult it, a point which we discuss below. But apart from that, the argument does not hold water. *For if things were that simple, why did the Commissioner change his instructions pamphlets when there was no change in the statute?*

Apparently the statute was not unambiguous to the Commissioner; it cannot be held unambiguous to those who are not tax experts.

The United States Supreme Court has held that taxation is largely an arcane subject, about which the specialized agencies know more than the courts. In

Dobson v. C.I.R., 320 U.S. 489, the Supreme Court said (p. 498):

> "It [the Tax Court] deals with a subject that is highly specialized and so complex as to be the despair of judges."

In tax matters the general practitioner stands in much the same relation to the tax specialist as the layman stands to the general practitioner.

Under these circumstances a tax statute cannot be said to be "unambiguous" to a taxpayer, where the taxing authorities themselves have given it varying applications.

So it is probably a misstatement of the issue (the old records being unavailable) for respondent to say at Br. p. 19:

> "In essence, the taxpayer is seeking to justify his failure to file declarations upon a *mistaken* impression of the law and upon the failure of the Commissioner to advise him that he was *not* complying with the law." (Italics added.)

This assumes that the Commissioner did not change his practice; the instructions pamphlets, however, indicate the contrary. If the Commissioner did not require estimated tax returns before 1950, then there was no mistaken impression of the law, and no occasion to "advise" of "not complying with the law".

The defense is not the above, but that the change was noted obscurely, in a way that could easily be missed. Not even respondent now argues that overlooking the change when it was made (1950-51) would

constitute "wilful neglect". (Cf. *Felton v. U.S.,* 96 U.S. 699, 702, quoted Pet. Op. Br. pp. 33-4.)

b. The other argument is that the taxpayer, being a lawyer, should have checked the correctness of the instructions pamphlets against the statute, and not doing so, was guilty of "wilful neglect". See Resp. Br. p. 20:

> "In any event, he is particularly qualified to investigate to determine whether his impressions of the law were correct."
>
> (p. 22) "Thus, a taxpayer, and particularly one who was an experienced attorney, was clearly placed on notice that he was required to file a declaration, or at the very least *to check* whether a declaration should be filed." (Italics added.)

On p. 21 of his brief, respondent also argues that because petitioner consulted other sources on the matter of apportionment, he should have consulted other sources on matters contained in the instructions pamphlets.

This whole argument will not bear analysis.

First. The instructions pamphlets are themselves *administrative interpretations* of the statute. With one exception (see *infra)* there is neither occasion nor logic in checking the correctness of the administrative interpretation *against the statute.* In the *first* place, there is no *a priori* ground for assuming the instruction pamphlet to be wrong, or to be wrong in any particular respect. What the respondent asks, is that the taxpayer, if a lawyer, should check the entire

instructions pamphlet against the statute, somewhat in the manner of a proofreader. But then the instructions pamphlet would serve no purpose.

Secondly, there is no logic in going from the instructions pamphlet to the statute. Like any other executive interpretation, the instructions pamphlet is an executive application of the statute. The statute is general, the executive interpretation is specific. The logical thing is to go from the statute to the executive interpretation, not *vice versa.*

Third. The only basis for going from the instructions pamphlet to the statute would be that the instructions pamphlet is so far out of line that it is *contrary* to the Acts of Congress (as were the "treasury regulations" in *U.S. v. Calamaro,* 354 U.S. 351, and *Granquist v. Hackleman,* No. 16035).

And that is, in fact, the Commissioner's contention. Respondent claims that if the taxpayer is a lawyer, he must assume, *a priori* and on general principles, that the Commissioner is acting contrary to United States statutes. Otherwise the lawyer-taxpayer is guilty of "wilful neglect". We submit the contention refutes itself.

c. (1) Nor is respondent's position advanced by the item "that if he needed more information he should inquire at the nearest office of the Collector of Internal Revenue". (Resp. Br. p. 22.) This refers to nothing in particular, and leaves the matter of "need[ing] more information" to the taxpayer's judgment. Respondent is wholly wrong in arguing that

this catch-all refers specifically to an estimated tax return and that supposedly—

> (Resp. Br. p. 22) "Thus a taxpayer, and particularly one who was an experienced attorney, was *clearly placed on notice* that he was required to file a declaration, or at the very least, to check whether a declaration should be filed." (Italics added.)

Moreover, even if there were a misjudgment as to whether it was necessary to get information outside the instructions from the Collector's Office, or whether the instructions pamphlet was sufficient—this would in no event constitute "wilful neglect". *(Felton v. U.S.,* 96 U.S. 699, 702.)

(2) Respondent also argues that because the petitioner went outside the instructions pamphlet for the apportionment under Sec. 107 of the 1939 Code, it was supposedly "wilful neglect" not to go outside the instructions pamphlet on other things.

The difference, of course, is that the instructions pamphlets do not purport to cover apportionments under Sec. 107, but they do purport to cover estimated tax returns. The Commissioner's argument is that if the taxpayer goes beyond the instructions pamphlet on matters with which the pamphlet does *not* deal, he must, to avoid "wilful neglect" go beyond the instructions pamphlet in matters with which it *does* deal. Again, we submit, the contention refutes itself.

Where, as here, the tax has always been paid in full, the "advantage" or disadvantage to which respond-

ent refers (Resp. Br. p. 21) in filing or not filing the additional forms is inconsequential.

(3) The insinuation at Resp. Br. p. 21 that after 1944 petitioner filed no estimated return, knowing the law to require them, is *contrary to the finding* of the Tax Court, which finds the existence of petitioner's belief:

> (p. 53) "Under the belief that the law had been changed, petitioner filed no declaration during the period 1945 to 1953, inclusive."

Since respondent attempts to prevail on findings which the Tax Court did not make, it must be inferred that respondent doubts his right to prevail on the findings which the Tax Court *did* make.

(4) On page 22 respondent refers to the "hundreds of thousands who filed such declarations during these years". Considering the total population of the United States "hundreds of thousands" (i.e. less than a million during a period of prosperity in a country of 150,000,000 population) is a small percentage. If as many as 2,000,000 1040-returns were filed, which is altogether likely during a period of prosperity and high taxes (and of which respondent has peculiar knowledge) "hundreds of thousands" would be *less than half*.

In any case, the true significance of the figure would appear only if it were compared with the number who did *not* file. The record contains no evidence on that point (it is within the peculiar knowledge of respondent). But the issuance of the press release of March

13, 1950, and the change in the language of the instructions pamphlets for 1950 and after, indicate that the number of *nonfilers* must have been substantial. The issuance of the press release and change in the instructions pamphlets also indicate that respondent himself considered his instructions before 1950 to be *at least unclear.*

In *Fihe v. C.I.R.,* 15726 (decided Oct. 21, 1958) the taxpayer did not claim any legal basis for his acts, but instead argued that he had made *other mistakes against himself.* The Court said, "Carelessness in one regard is no counterweight for carelessness in another for which a penalty is provided."

That, of course, is not the situation here. Apart from that, any inconsistencies between *Fihe v. C.I.R.* and *Dobson v. C.I.R.,* 320 U.S. 489, 498-9, would have to be resolved in favor of the language of the Supreme Court.

IV. NO DOUBLE PENALTY UNDER SEC. 294(d). (Resp. Br. pp. 23-6.)

A. Respondent adds only three points to what is already discussed in our opening brief.

First, Delsanter v. C.I.R. (6th Cir.) is cited (Resp. Br. p. 25) as if it were contrary to the *Acker* and *Harp* cases. But the Tax Court in *Delsanter v. C.I.R.* decided some points in favor of the Commissioner and others in favor of respondents, writing an Opinion and findings of eighteen pages. The *per curiam* decision of the Sixth Circuit does not disclose what ques-

tions were submitted to it. (Since the petitioners had prevailed on some points under Sec. 294(d) it may be that they brought only other matters to the Court of Appeals.)

Second. It is quite true that we made alternative arguments as to the applicability of Secs. 294(d)(1)(A) and 294(d)(2). See Pet. Op. Br. pp. 40-48, and Resp. Br. pp. 25-6.

We argued that the Commissioner's construction of the statute is wrong in all respects—there can be no double penalty; under the commissioner's argument Sec. 294(d)(1)(A) could never stand alone. We also argue, that even if the Commissioner should be right about the *double penalty,* he is still wrong about a 294(d)(2) penalty where non-filing is held due to reasonable cause. In objecting to this argument, the Commissioner fortifies our point that, *under the Commissioner's interpretation, Sec. 294(d)(1)(A) can never stand alone.*

Third. Commarano v. U.S., 79 Sup. Ct. Rep. 524, 27 L.W. 4131 (Resp. Br. p. 26), furnishes its own answer. At p. 532, the opinion distinguishes other factual situations—

> "This is not a case where the Government seeks to cloak an interpretative regulation with immunity from judicial examination as to conformity with the statute on which it is based simply because Congress has for some period failed affirmatively to act to change the interpretation which the regulation gives to an otherwise unambiguous statute, Cf. *Jones v. Liberty Glass Co.,* 332 U.S.

> 524. Nor is it a case where no reliable inference as to Congress' intent can be drawn from re-enactment of a statute because of a conflict between administrative and judicial interpretation of the statute at the time of the re-enactment."

In the 1954 act there was not a re-enactment but a change—a change which dealt with exactly the situations mentioned in the above quotation. The Commissioner had given an erroneous "interpretation" "to an otherwise unambiguous statute", and there was a conflict between the Tax Court and the District Courts. See opinion of Tax Court, R. 58; also discussion both in *Acker v. C.I.R.,* 258 F. 2d 568, 572 and *Patchen v. C.I.R.,* 258 F. 2d 544, 551-2.

B. If *C.I.R. v. Acker* has not yet been decided by the Supreme Court at the time of the oral argument of the present case, petitioner asks leave to file in this Court copies of the *amicus curiae* brief which he asked leave to file in the *Acker* case. It adds a few matters to the discussion in petitioner's opening brief.

V. OTHER POINTS.

A. Respondent does not answer the argument that the Commissioner cannot profit by his own delay (Pet. Op. Br. pp. 48-51) except in footnote 3 at Resp. Br. p. 17. Here respondent relates the question to the destruction of documents, which is another point. But if there is a connection, the point works against respondent. If respondent cannot profit by his own

delay at all, he cannot profit where his delay has been so great that in the meantime he has destroyed his own records as "obsolete".

B. Other matters, not separately answered are adequately covered by our opening brief and this Brief.

VI. CONCLUSION.

The conclusion of our opening brief remain valid. The decision of the Tax Court should be reversed as there indicated.

Dated San Francisco, California,
April 20, 1959.

Respectfully submitted,
GEORGE OLSHAUSEN,
Petitioner.